Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES

WILLIAM T. LUTHER
Petitioner-Plaintiff-Appellant,

v

MIKE BURTON,
KENT COUNTY,
Respondents-Defendants-Appellees

Petition For A Writ Of Certiorari
To The 6th Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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August 27, 2002

52 pp

QUESTIONS

Petitioner pro se filed suit claiming violation of clearly established rights of association with family, right to travel and claims also violation of his right protecting against Double Jeopardy. But dismissal was granted on immunity grounds and affirmed without addressing all issues raised.

1. Whether pro se litigants as a protected class under 28 USC 1654 enforcing Constitutional rights under 42 USC 1983 have a constitutional right to have the questions they raise on appeal fully and fairly addressed and decided on the merits before affirmance and preclusion doctrines are applied and their rights lost?

2. Whether, in this "`new era' in summary judgment practice" (App p 6) in pro se civil rights cases, review of this case should be made in light of "the limitation imposed by the 7th Am. . . that the right of trial by jury be *not obstructed and . . not interfered with.*" (***Ex Parte Peterson***, 253 US 300, 310 (1920) emphasis added

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Petitioner William Luther respectfully requests that a writ of certiorari issue to review the decision of the 6th Circuit Court of Appeals and the District Court decision herein.

JURISDICTION

Jurisdiction rests in 28 USC 1254. The decision of the 6th Circuit was made on April 30, 2002. Extension of time was granted by Justice Stevens until August 28, 2002. (App 20)

CONSTITUTIONAL & STATUTORY PROVISIONS

This suit was brought under 42 USC 1983. The Civil Rights Acts of 1871, 42 USC Sec 1983, says in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ."

Since Petitioner has been pro se from the start, 28 USC 1654 is also integral to review.

1654. Appearance personally or by counsel
"In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

Petitioner requested a jury trial on the complaint. (App 17) The Seventh Amendment provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to jury trial shall be preserved. . . ."

Also relevant are the 1st Amendment right of Association, the 5th Am right to Double Jeopardy, plus the Due Process Clause of the 5th and 14th Am. and the 14th Am. Privileges and Immunities clause and Equal Protection Clause. Plus the 9th Amendment common law rights including the rights to live and do business where one pleases without requesting government permission or being exiled because of official whim.

OPINIONS BELOW

The decision of the 6th Circuit is unpublished and reproduced in the appendix. App p 1. The district court decision is reproduced in the appendix. App p 3. (publishedor unpublished?)

SUMMARY OF THE CASE

Petitioner contends his right to impartial judges has been denied and they, as a result, have denied him justice, a jury trial and lawful and deserved relief under the civil rights statutes.

STATEMENT OF THE CASE

Mr. Luther does not agree with all the facts alleged by either the court of appeals or district court. They are erroneous.

Mr. Luther has always contended he was falsely and maliciously charged, in 1994, by police and county prosecutors with a sex offense allegedly involving a 9 year old neighbor boy. The charge was not made until 3 months after the alleged offense took place. During that time the boy had told no one. He came up with the story after allegedly being found naked in the trunk of the family car and subsequently being questioned by his parents.

Mr. Luther was initially jailed, then tethered for over a year before his attorneys could negotiate a total plea bargain including sentence of 4 years probation and a nolo contendre plea without Luther admitting any offense. (Fn Mr. Luther has always contended he is innocent and has attempted to have the conviction overturned several times. However, between the charge and sentence, the state

constitution was changed prohibiting appeals by right of those who plead guilty or nolo contendre. One attorney took money to appeal, but took 17 months to file anything.)

Luther was sentenced to probation in early , Jan 8, 1996. (Fn Def. Burton had nothing to do with the initial probation or sentence.) He had been on probation for some time, when Defendant Burton, Luther's probation officer in Kent County, caused a judge to order Luther exiled from Kent County except to travel through or with Burton's permission to enter for a limited time and purpose. The restriction allegedly stated:

> "Shall not enter the County of Kent, Michigan, except in passing through while driving on I-96, I-196, or US-131 in transit to another county, without written permission from the Probation Officer." (Burton Motion to Dismiss & Summary Judgment, affidavit at #5)

Luther was therefore forced to move out of Kent County. He was barred from Kent County for 14 months, until after Burton retired and the restriction was lifted as requested by one of Luther's attorneys. (App p 17)

The Lawsuit and Defendants.

Mr. Luther sued under 42 USC 1983 contending several violations of his and his then underage children's constitutional rights and requested a jury trial. (App p17)

Defendant Kent County, Michigan

Mr. Luther sued Kent County because the judge (Lieber) has absolute immunity. And because Kent County voters elected the judge and are the closest local body with a purse. But in addition, Luther believes under the First Am. voters have a need to know whether a judge is competent or not. If the judge violates civil rights, and if justice is to prevail, the voters have a right to know it. When, and if, the voters have to pay money out of the county coffers, the newspapers will likely report it and then the county and taxpayers will be much more knowledgeable and responsive to other citizens rights that are being routinely violated by judges. When a

judge is absolutely immune, the citizens never find out that he violated a citizens rights.

Secondly, Defendant Burton has ties to Kent County that can be considered under the color of law of Kent County, in part, due to the limitation on his jurisdiction, connections to the judge, police, prosecutors, etc.

Defendant Burton

Mr. Luther sued Mike Burton because he recommended and persuaded the judge to order Luther be exiled from Kent County and caused the travel bar from Kent County, etc. The travel restrictions were added months after Mr. Luther and his counsel and the prosecutors had negotiated the initial plea and sentence of 4 years probation, which was agreed to by the judge. (These events occurred after Luther and his wife divorced and he and his ex-wife had a disagreement - she refused to let him in the home he co-owned with her at the time to visit the children. Mr. Luther believes his wife, and possibly others, had some input to Burton behind the scene to make the restriction.)

Mr. Luther has contended that the exile restriction violated his rights in several ways. First his right to Double Jeopardy protection - it was added after the completely negotiated sentence of only probation. (This argument was raised at the 6th Circuit. See App p 2)

Second, he believes the order may have violated his right of Due Process of Law in the fashion in which it was invoked and applied - without hearing, notice, counsel, or was coerced, etc.

Third, it violated his right of travel. (This was raised in the complaint. (See App p 17-19) It was raised also at the 6th Cir. (App p 2)

Fourth, it violated his (and his children's) First Amendment right to Associate with his children and family members and friends, business associates and even his lawyers. (This issue was raised in the Complaint, App p 17-19 and at the 6th Cir. App p 2)

Fifth, Mr. Luther contended the exile restriction violated his right to do business protected by the 9th

Amendment. (Raised by Complaint, count 4. App p 18. Not addressed at the 6th Cir. due to the initial disposition of the case.) In addition it violates his common law right to live where he wants to and without state government permission.

Sixth, it violated his 14th Amendment rights of Liberty, Privileges and Immunities, and Equal Protection by giving to Burton dictatorial powers over his rights to attend functions and events in Kent County available to other citizens on probation and not. (This issue has not been fully raised before due to the quick disposition of the case and no chance to amend the complaint.) (Fn. This Court has said the right to travel falls under the privileges and immunities clause of the 14th Am. - ***Saenz v Roe***, 526 US 489 (1999). Mr. Luther believes it may also be a 9th Am. common law right. See complaint App p 18-19)

Seventh. The 7th Am. right to jury trial has been violated, Mr. Luther contends, by the unjust disposition of the case at the district court and 6th Circuit Court of Appeals. Questions raised about the right of jury trial were raised on appeal in the Appellants Brief at p 3, 12 and other places in general by attacking the grant of summary judgment.

Proceedings at the District Court

Mr. Luther filed the Complaint requesting a jury trial. (App p 17) Kent County answered the complaint and moved to dismiss and for summary judgment. They answered some simple interrogatory questions and did not answer others.

Mike Burton, represented by the state attorney general, submitted, at least, 2 extensions of time to answer the complaint, which they never did. (See Rule) Instead they filed what the judge has called a "hybrid motion for summary judgment or to dismiss". (App p 4) Mr. Luther called it a "confusingly commingled" motion to dismiss and for summary judgment. (App p 5) Burton admitted being Luther's probation officer at the relevant time and

recommending the exile restriction and knowing that Luther and his wife were disputing. But contended the order was issued by the judge, not him (Motion Dismiss & SJ Brf p 4-6) He does not claim Luther received any sort of Due Process of law.

In Burton's Motion to Dismiss and SJ, Burton's attorney made no attempt to review or offer authorities that the rights claimed - travel, association, double jeopardy - were not clearly established, a necessary foundation for the qualified immunity defense pressed. Instead, he argued that the burden of proof was on Luther. (Bf p 9) (Fn Luther disagrees. The initial burden of proof is on the party claiming the defense. See ***Butz v Economou***, 438 US 478, 506 (1978) Mr. Luther contends that at least the Def. attorney should offer an affidavit or statement subject to perjury that he has researched the issue and found no clearly established right. Otherwise the commingled motion to dismiss and for summary judgment is pure harassment and a useless waste of time, money and effort for the nonmovant, with the substantial chance of losing for a pro se plaintiff.)

Then when Mr. Luther finally found out how to get hold of Mr. Burton and attempted discovery, Burton moved to bar discovery and it was granted, with little chance to respond. (App p 4-5)

Burton's stay motion alleged a "threshold question of immunity". (Brief in Support of Def. Burton's Motion to Stay Discovery, p 3) They also argued a "heightened pleading standard" be applied, presumably because Luther was pro se and a convict or wrongly thought to be a prisoner. (Id. p 3) (See ***Crawford-El v Britton***, 523 US 574 (1998) - heightened pleading standard in pro se case rejected; ***Leatherman v Tarrant County Etc.***, 507 US ____, 122 L Ed 2d 517, 113 S CT 1160 (1993) same.)

They argued it would save "unnecessary costs and burdens on Defendants" and "avoid the unnecessary use of public funds and public employee time." (Id, 6, 7) (Fn Of course they were not concerned with the Plaintiff's costs of

appeal and being bounced from court to court like a tennis ball. Or the harassment factors.)

Petitioner contends they also had an unmentioned goal of concealing the truth and relevant facts and documents. A goal common among liable defendants attempting to avoid liability.

In summation there was no discovery of Burton allowed.

Mr. Luther then filed a motion for clarification of the "confusingly commingled" motions.

Without receiving an answer or denial or chance to respond, the motion was denied and the case rushed to conclusion by summary judgment being granted Defendants and justice denied Plaintiff. (App p 4-5) The motion for clarification was based on the fact that the motions were "confusingly commingled" and, therefore, next to impossible, or at least very difficult, to answer (and he felt they were insufficient). (See App p 5) (Fn It is common knowledge that motions to dismiss and summary judgment are not the same. They have, at minimum, different rules, standards of review, precedent decisions and discovery interests. Mr. Luther claims that to burden a pro se litigant with figuring which is which and answering both at the same time violates his rights to Due Process of Law and is oppressive. Furthermore, he objects to this escape from the duty to answer and denial of discovery.)

But the District Judge allegedly sua sponte converted Defendant Burton's "confusingly commingled" motion to dismiss and summary judgment into a motion for summary judgment. After denying Luther discovery and clarification, he granted Burton's motion without giving Luther a realistic chance to respond. (App p 5)

The judge contended there is conflict in the circuits on the right of intrastate travel. (App p 11-12) He never addressed whether the right to associate with children and the other rights claimed by Luther were clearly established.

Then the district judge declared probation officer Burton had 11th Am. immunity in his official capacity. He

also declared that he had qualified immunity in his personal capacity because the right to intrastate travel was not clear. (App p 12)

Finally the docket record reveals Mr. Luther did not even receive a copy of the decision and order. It reveals no less than 3 instances where mail was returned to the district court.

Thus, Mr. Luther had no chance to move for rehearing, etc. Luther only found out that a decision had been made when Burton filed a motion for costs. He immediately filed a notice of appeal having no idea what the content of the decision was.

6th Circuit

Mr. Luther appealed timely. He raised several issues. The first and probably most important was that the district judge was biased in favor of government and against pro se litigants - plaintiff in this case - and that the decision was all wrong because of the bias. (Others can attest to the bias of this judge. The bias charges on appeal, however, were confined to the evidences in the record and decisions.)

The Defendants responded and Mr. Luther filed a reply brief and was responsible making and filing the joint appendix.

The 6th Circuit acknowledges the bias charge was made, and 3 others - denied discovery, double jeopardy, no immunity. (App p 2) But it did not address any of them. (See App 1-3) Plus other issues not recorded were argued, but not addressed - Kent County liability theories.

The 6th Cir. instead jumped over these primary and fundamental issues to an erroneous conclusion of lack of proof.

They concluded without addressing all the issues "In sum, Luther failed to present evidence on which a jury could reasonably find for him and against Kent County and Burton." (App p 2-3) (Fn Isn't "evidence" directly related to the denial of discovery and chance to respond to a clear motion?)

(Fn Petitioner contends that the 6th Circuit judges are biased also. Biased against pro se litigants and in favor of government and especially in favor of district court judges and that their decision and lack of decision are evidences of the bias.

Mr. Luther also contends the 6th Circuit twisted and turned the truth, facts and law in order to dispose of a case it did not want to reverse for prejudicial reasons. Either prejudice for the judge and/or prejudice against pro se litigants or both.

Consider the alternative. If they had found bias on the part of the judge, they would have had to reverse in favor of a pro se litigant. That would supremely embarrass the judge and the judicial system. Judges have biases also. They don't like to be embarrassed, and especially not by pro se litigants.)

But this Court should also consider that the conclusion reached by the 6th Circuit is also contrary to the facts.

They state:

"Luther presented no evidence that either Kent County or Burton were responsible for the conditions of his probation. Under the Michigan Constitution, the courts constitute a separate branch of government from the counties. Mich Const. of 1963, art. VI, sec 1; art. VII, sec 1. Thus Kent County could not be held responsible for a judge's decision. Moreover, Burton swore that he was employed by the Michigan Department of Corrections and was not personally involved in the judicial order that imposed probation on Luther. Luther did not counter that proof. In sum, Luther failed to present evidence on which a jury could reasonably find for him and against Kent County and Burton. See ***Anderson v Liberty Lobby, Inc.***, 477 US 242, 252 (1986)." (App)

First, in answer, Luther argues he was denied discovery. How could he present evidence that was denied him?

Second, he was denied the chance to answer Burton's motion by the sua sponte conversion of the motion by the district judge and denial of his motion for clarification of the "confusingly commingled" motion to dismiss and for summary judgment. (See App) and rush to judgment by the judge.

Third, by affidavit at the District Court in response to Kent County's Motion to Dismiss and for Summary Judgment Luther stated:

> "1. While on probation, I reported to Mike Burton when in Kent County or wanting to enter Kent County to see my children or friends or conduct personal business until his retirement." (emphasis added)

Burton, where he contends he was not involved, could only contend he was not involved in the initial sentence of probation. He admits involvement in the Kent County restriction in his motion to Dismiss and For Summary Judgment. (p 3)

> "Defendant Burton explains that although he recommended the restricting amendment now complained of he did not himself impose the restrictions. Recommendations were made to the controlling circuit court which imposed the restrictions." (See also p 4)

There was no "controlling circuit court." Luther had been sentenced in early 1996. That ended the judge's jurisdiction over him, except possibly for a serious violation of probation, which Luther contends never happened.

The attorney general also argued, defending Burton, that there was no clearly established rights violated. But he offered no authorities. Even the district judge disagreed finding a conflict been the circuits on the right to intrastate travel. Luther disagrees.

Lastly, on appeal Mr. Luther submitted exhibits that show that probation officers operate within Kent County and it shows the restrictive effect of the probation restriction. (Don Stephens, Probation Agent letter of Sept. 17, 1997, #14. Header says "Kent County Circuit Court Probation Department, Kent County Michigan" and two other letters. 6th Cir Appeal Appendix #14.)

REASONS FOR GRANTING THE PETITION

1. PROTECTING PRO SE LITIGANTS AS A CLASS ATTEMPTING ENFORCEMENT OF THEIR CONSTITUTIONAL RIGHTS IS A MATTER OF NATIONAL IMPORTANCE. A QUESTION THIS COURT HAS NEVER BEFORE ADDRESSED.

This case is important for many reasons, but at the top is the fact that Petitioner's rights were violated. Now they have been violated again by not being able to enforce them. Petitioner contends there is prejudice against he and the class he represents.

Petitioner is a member of a protected class - pro se litigants. Congress and the President extended protection to this class in 28 USC 1654. (Quoted at Pet. p 1) Plus, the right to litigate pro se is a long established common law right protected by the 9th Amendment and is further guaranteed in many states by their Constitutions. (Michigan, Art. 1, Sec 13)

It should be of interest to this Court that a whole nationwide class of litigants are being denied Due Process of Law and Equal Protection because they represent themselves.

Presuming at this point pro se litigants are being discriminated against by judges, both federal and state, this denial of Constitutional rights enforcement is a national problem deserving this Court's prompt and full attention. Furthermore, it is important because the denial of rights affects both civil and criminal cases.

This Court should also be concerned because the class is generally poor or middle class, and cannot afford attorneys, like the Defendant's governments attorneys paid by taxpayers, and has members of all races, colors, origins, abilities and educational levels in every state. Plus, it is truly a class without any representative or voice.

The 14th Am. provides for Equal Protection of the laws. So also does 42 USC 1981. ***Goodman v Lukens Steel***, 482 US 656, 661, 96 L Ed 2d 572, 107 S Ct 2617 (1987) states that sec 1981 includes "personal rights to sue." Pro se litigants therefore have the right to Equal Protection in litigation. In other words, to all rights equal to those granted attorney represented cases including JUSTICE. But Equal Protection is only obtained, like other rights, through enforcement. Pro se plaintiffs have the right to Equal Enforcement of their rights. But they cannot find it in the face of judicial prejudice.

As will be seen below, how can judicial bias ever be established if the question is never addressed on appeal? In this case there is no question that judicial bias was alleged. And it is quite evident that the question was avoided. (App p 2) Plus, if the briefs were read, it is apparent to a reasonable person that judicial bias controlled the judgment of the district court.

Petitioner contends and believes he can support the allegation that Constitutional rights enforcement has long been denied this class. As the Court has seen above, there are several Constitutional rights in this case that have been denied the enforcement intended by the two law making branches of government - the President and Congress - under powers granted to them by the People in the 14th Amendment and subsequently enacted as 42 USC 1983. (Fn First Am. right of Association with family, 5th right of Double Jeopardy, Due Process of Law, 14th Amendment right to travel, etc. See Pet. p 4-5 & App p 17-19) Pro se litigants have the right to enforce these rights in fact, but not in effect.

These enforcement rights have been denied by lower federal courts by their respective dispositions of this case on widely varying and inconsistent grounds and, Petitioner contends, unlawful grounds.

The law making bodies endowed the judicial branch with the primary duty of enforcement of these rights. Without its full and unwavering support and proper function, these rights are totally unenforceable for this class.

That is why this Court should be greatly concerned and involved in this case.

The right of enforcement of Constitutional rights is clearly endangered as shown by this case. It is not that the rights are not clear. Almost every right claimed is clear and has been for some time. (Fn The district judge claimed the right of intrastate travel was not clear because of a conflict between the circuits. (App p 12) But that is no reason at all. This Court has never held that a right must be approved by it to be clear. Furthermore, there is ample authority in Michigan case law proving that the right was clear a century ago. See)

One right that has long been established is that litigants are entitled by right to an unbiased judge. (See 28 USC 455) (Plus many cases.)

We suppose that before this Court would place any blame upon biased judges, as Petitioner does, it would need some proof.

In re Little, 404 US 553, 555 (1972) this Court held that a defendant forced to be pro se by the judge ". . was therefore clearly entitled to as much latitude in conducting his defense as we have held is enjoyed by counsel vigorously espousing a client's cause. ***In re McConnell***, 370 US 230 (1962)."

Presumably pro se litigants have, on the basis of these two cases and the 14th Amendment, Equal Rights to both represent and present their cases to a jury and win their cases as do attorneys and bar members. But while that assumption seems valid, it is far from true in practice. Pro se litigants have no enforceable rights, if the judge is biased.

Pro se litigants know from experience. This case is a prime example.

Do prior lower court cases reflect any discrimination against pro se litigants by district courts or appellate courts?

Consider a few other cases where pro se litigants have complained of discrimination by the judge and observe the result.

> "Posr also maintains that he was *the victim of discrimination against pro se litigants, and he claims that pro se litigants are a protected class.* He cites no authority for the later proposition." ***Posr v Court Officer Shield 207***, 180 F3d 409, 419 (1999 2nd Cir) (emphasis added)

In ***State Farm Ins. Co. v Baasch***, 644 F2d 94, 97 (1981 2nd Cir) the parties were denied a jury trial. ("Baasch *also alleges discrimination against pro se litigants in violation of the equal protection clause*, . " fn 6) (emphasis added) In ***Baasch*** a *state court clerk* decided they did not get a jury trial when both parties had requested one and despite the fact it was a right under state law. See 95. Did the Court fully address the bias issue?

In none of these cases was the issue of judicial bias addressed.

In ***US v Brad Metcalf***, No. 99-1667 (6th Cir. 2000) (unpublished) Metcalf pro se challenged the impartiality of the Michigan federal judge. The Court answered superficially.

In cases before this Court, can the Court honestly say that anti-pro se prejudice was *not* involved in ***Becker v Montgomery***, 532 US 757 (2001) (pro se appeal denied, not by the clerk, but by the judges because of lack of a signature.) or ***Haines v Kerner***, 404 US 519 (1972) (district court wrongly dismissed) or ***Gideon v Wainright***, 372 US 335 (1963) or ***Argersinger v Hamlin***, 407 US 25 (1972) or ***Crawford-El v Britton***, 523 US 574 (1998)(heightened pleading standard in pro se case rejected)?

Isn't it possible that some judges, in fact, hold pro se litigants to a *much higher standard* than they do even of attorneys, as urged by the attorney general in this case? (See Burton's Motion to Stay Discovery, p 2-3 and see p 5 ref. pro se case of ***Terrell v Brewer***, 935 F 2d 1015 (9th Cir 1991) re: denial of discovery.)

Then add in the hard to detect and seldom addressed element of judicial prejudice against pro se litigants and/or in favor of government. Substantial rights are then soon lost.

If any of these cases had been allowed to succeed in challenging the impartiality of the judges, they would have won reversal. ***Tumey v Ohio***, 273 US 510 (1927) and many other cases since. See ***Republican Party of Minnesota v White***, No. 01-521, 122 S Ct 2528, 2535, 153 L Ed 2d 694 (2002) (listing cases). This is a result Petitioner should have enjoyed. But is it any wonder that on appeal the court's do not address the issue?

This Court should also consider that some judges are so thin skinned and biased that they will retaliate with contempt convictions for protected free speech telling a judge he is biased and even for filing a motion contending bias. (See ***In re Little***, 404 US 553, 92 S Ct 659, 30 L Ed 2d 708 (1972) (pro se denied counsel, found in contempt for accusing judge of bias. rev. and *Holt v Virginia*, 381 US 131, 136 (1965) quoted in *Little* at 556.)

Plus there are some "<u>. . judges who may be sensitive to the winds of public opinion.</u>" ***Craig v Harney***, 331 US 367, 376 (1947)" quoted in ***In re Little***, 404 US 553, 555, 92 S Ct 659, 30 L Ed 2d 708 (1972)

This Court may not be aware of it, but in the state courts of Michigan pro se cases that are disliked by appellate judges (almost 100%) are just never granted discretionary review or dismissed outright even when the have an appeal by right. Especially ones that complain about biased judges.

That is primarily why they never have a decision of the state's highest court or even 2nd highest court. And

subsequently they are never reviewed by this Court. (A list of cases denied cert. can be provided upon request.)

Whereas in the federal court system, appeal is by right, as here. But even that does not guarantee a decision on the merits of challenges to judicial bias, as this case clearly demonstrates.

In the present case Petitioner on appeal vigorously and seriously challenged the impartiality of the district court judge. (See Appellants Brief and Reply Brief.) The 6th Cir. acknowledged the challenge but did not address the question. (App p 2) (Does one have a Due Process right to a decision on the merits of questions raised and supported? Pro se litigants don't seem to, since the appellate court admits it did not answer several of them. (App p 2)) It is at least possible that the questions not addressed could have been dispositive and grounds for reversal.

Only when this Court applies some high level of scrutiny and begins aggressive consideration of pro se cases will the rights involved be protected.

Review should be granted to protect this large class of mostly poor, relative to government defendants at least, and less able litigants from having the enforcement of their Constitutional rights nullified by biased judges.

2. PETITIONER DESIRES REVIEW TO DETERMINE IF THE 7TH AMENDMENT IS BEING "OBSTRUCTED" AND "INTERFERED WITH" BY JUDGES UNJUSTLY UTILIZING SUMMARY JUDGMENT.

Read "broadly" (***Feldman v US***, 322 US 487, 496 (1944) (J. Black dissenting citing ***Counselman v Hitchcock***, 142 US 547, 562, 12 S Ct 195, 198, 35 L Ed 1110; ***McCarthy v Arndstein***, 266 US 34, 45 S Ct 16, 69 L Ed 158) the 7th Amendment prohibits all 3 branches of government from "obstructing or interfering" with civil jury trials. That is consistent with the Declaration of Independence and intent of the Founders and People in making the 7th Amendment and including it in the Bill of Rights. (See J. Rehnquist

dissenting, ***Parklane Hosiery Co. v Shore***, 439 US 322 (1979))

This Court said in ***Ex Parte Peterson***, 253 US 300, 310 (1920)

> "The limitation imposed by the [7th] Amendment is merely that enjoyment of the right of trial by jury be *not obstructed*, and that the ultimate *determination of issues of fact by the jury be not interfered with*." (emphasis added)

> "The right to a jury trial guaranteed in the federal courts is that known to the law of England, not the jury trial as modified by local usage or statute. ***United States v. Wonson***, 1 Gall. 5, 20; ***Capital Traction Co. v. Hof***, 174 U.S. 1, 8; see also ***United States v. Rathbone***, 2 Paine, 578; ***Howe Machine Co. v. Edwards***, 15 Blatchf. 402; ***Sulzer v. Watson***, 39 Fed. Rep. 414; ***United States v. Wells***, 203 Fed. Rep. 146, 149." Id. at 309.

Justice Rehnquest dissenting in favor of the 7th Am. reminded the Court:

> "Because "'[maintenance] of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence . . . any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'" ***Dimick v. Schiedt***, supra, at 486, quoted in ***Beacon Theatres, Inc. v. Westover***, 359 U.S. 500, 501 (1959)." ***Parklane, supra***, at 346, J. Rehnquest dissent. (emphasis added)

Petitioner requests that careful scrutiny here.

Congress has protected the right to jury trial by statute. 28 USC 2072. It requires that the Rules of Civil Procedure "shall preserve the right of trial by jury as at the common law and as declared by the Seventh Amendment to the Constitution." See ***Colgrove v Battin, US District Judge***, 413 US 149, 183, 93 S Ct 2448, 37 L Ed 2d 522 (1973).

In addition, Congress of late has clearly recognized an increased need for jury determinations (v judges) in civil rights cases. Title VII.

But, as acknowledged in ***Peterson***, these protections of the right can be "obstructed" or "interfered with" Id. at 310 by judges in this "new era" (App) of summary judgment.

The number of cases where this Court has reversed summary judgment are not infinitesimal. In fact, the number provides substantial support for hearing this case. Can the possibility then be remote? Petitioner does not believe so.

In fact, if research were available, Petitioner is convinced that the vast majority of civil rights cases filed are dismissed or granted summary judgment. Many are never reviewed because they others didn't have the very "long purse" to make the repeated appeals ending at this Court. (Justice Douglas dissenting in ***Clay v Sun Ins.*** 263 US 207, 228 (1964) "Some litigants have long purses. Many, however, can hardly afford one lawsuit, let alone two.") (The same applies to appeals.)

If, as was found in ***US v Microsoft***, (2001, DC Cir), a judge is prejudiced against the rich and famous, like Bill Gates, isn't it at least possible, if not probable, that there are some, if not many, who are prejudiced against the notoriously short pursed poor and pro se?

The Court should review this case and find out.

In the 1973 case of *Colgrove, supra*, at 166, Justice Marshall dissenting lamented that "Some 30 years ago, Mr. Justice Black warned his Brethren against the "gradual process of judicial erosion which . . . has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." ***Galloway v United States***, 319 U.S. 372, 397 (1943) (dissenting opinion). Today, the erosion process reaches bedrock."

Petitioner disagrees that "bedrock" was reached 30 years ago. (As does J. Rehnquest dissenting in ***Parklane, Supra***.) The "new era" of summary judgment has bored

right through the "bedrock" to previously unfathomed depths of injustice obstructing the 7th Amendment.

Is it, at least possible that the district judge was not impartial and the court of appeals was biased? Consider. The district judge extended time for Def. Burton to answer at least twice, converted sua sponte commingled motion to dismiss and summary judgment into one for summary judgment, then denied discovery. (App) See Anderson , Rule ____ .) He denied the right to clarification of the confusingly commingled motion to dismiss and summary judgment brought under two different rules, case law, etc. (App) (See ***Republican Party of Minnesota v White***, No. 01-521, 122 S Ct 2528, 2535, 153 L Ed 2d 694 (2002) "Clarity on this point is essential . . ") He even admits the motion was a "hybrid" (App p 4) The district judge then dismissed in favor of Def. primarily on immunity grounds. (App p 4-16) However, the Court of Appeals affirmed on "lack of evidence grounds." (App p 1-3) They refused to decide the merits of dispositive challenging questions about the denial of discovery, impartial judge, Double Jeopardy, etc.

Is it possible that anything that is twisted enough, including the truth, justice and the law, becomes unrecognizable? and thus willfully hidden? YES.

In ***Republican Party of Minnesota***, supra, Justice O'Conner raises honest and valid concerns about the substantial political bias of elected state judges. S Ct at 2542-2544. But the judge found biased by the Court of Appeals in ***Microsoft***, supra, was a federal judge with a lifetime appointment. That state judges are pro government and anti-pro se is a provable fact. (Fn Is not the fact that a judge is a lawyer, reason to believe he would favor lawyers over pro se? Then add in contributions to his campaign for judgeship from lawyers and figure the potential bias.) But this fast growth cancer has also spread to the federal bench as is evident in this case. (See Brief to 6th Cir.)

The question here is whether federal judges have intentionally obstructed or interfered with the 7th

Amendment right to a jury trial of the pro se plaintiff-petitioner?

The answer is yes and for this reason the Court should review this case and provide a remedy.

3. THIS COURT SHOULD DECIDE THE QUESTION OF THE RIGHT TO INTRASTATE TRAVEL BECAUSE OF ITS NATIONAL IMPORTANCE TO ENFORCEMENT OF CIVIL RIGHTS AND TO SETTLE THE ALLEGED DISPUTE AMONG THE CIRCUIT COURTS AND TO CLARIFY THE ISSUE AS IT RELATES TO QUALIFIED IMMUNITY.

The district judge dismissed this case on the alleged basis of qualified immunity contending there is no clear right to intrastate travel. But he willfully ignored other clearly defined rights raised in the complaint. - the right to associate with family. He concentrated exclusively on the right to intrastate travel in order to dismiss contending it was not clear at the time. But he did so by excluding just simply the "right to travel". Petitioner contends he was searching for a loop hole in which he could ditch this case.

There is little doubt that the "right to travel" is clearly established. No less than 100 US Supreme Court cases mention the words in various contexts dating back to ***Worchester v Georgia***, 31 US 515 (1832). One of the latest ***Saenz v Roe***, 526 US 489 (1999) held that the right is protected by the 14th Amendment's Privilege's and Immunities clause. (Whether it is protected by that clause or the 9th Amendment is not the major concern, but whether the right is enforceable against governments and their officials who violate it.)

However, in this case the district judge narrowed the issue in order to grant qualified immunity to Def. Burton. He held that the "right to *intrastate* travel" was not clearly established. (emphasis added) (App p 4) He contended that the right was not clearly defined because of alleged conflicts

between the federal circuit courts. (Fn Even if true, Petitioner disagrees. And he did so at the 6th Cir.)

Petitioner has not reviewed the cases to determine whether there is in fact a conflict between the circuits on the right to intrastate travel. He accepts the judge's statement as true that there is a conflict and contends this Court should settle the matter.

The 6th Circuit, for some unknown reason, did not address the issue. (Fn Petitioner contends it was because they did not want to reverse and damage the judge's pride and reputation - being reversed by a pro se.) It affirmed on grounds having nothing to do with qualified immunity or any immunity for that matter. (App p 3)

Even if there is a conflict in the circuits and this Court has not clearly held on the issue, there are other authorities who have that make, in Petitioner's belief at least, the right clearly established.

First, Petitioner contends it is a common law right. That can be seen in the fact that everyday people in every state, county, city and village come and go at will, without permission of the government or its officials. Petitioner should have had the same rights.

Second, the right was previously clear under state case law. In ***People v DeFillippo***, 80 Mich App 197, 262 NW2d 921, 924 (1977) the Court quoted from an early case that aptly proved the right protected as of, at least, 1889.

> "Personal liberty, which is guaranteed to every citizen under our Constitution and laws, consists of the *right of locomotion, --to go where one pleases, and when, and to do that which may lead to one's business or pleasure*, only so far restrained as the rights of others may make it necessary for the welfare of other citizens. *One may travel along the public highways or in public places*; and while conducting themselves in a decent and orderly manner, disturbing no other, and interfering with the rights of no other citizens, there, they will be protected under the law, not only in their persons, but

> in their safe conduct. The Constitution and the laws are framed for the public good, and the protection of all citizens, from the highest to the lowest; and no one may be restrained of his liberty, unless he has transgressed some law. *Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace*, unless for breach of the peace committed in his presence, or upon suspicion of felony, *would be most oppressive and unjust, and destroy all the rights which our Constitution guarantees.*" ***Pinkerton v Verberg***, 78 Mich 573, 584; 44 NW 579, 582-583 (1889)." (emphasis added)

(Fn the case had to do with the arrest of an alleged prostitute on the street without evidence of misconduct.)

Other federal district courts have concluded that the right of intrastate travel is only protected by the Michigan Constitution. See ***Goodrich v State of Michigan***, 4:99-CV-9 "the right to intrastate travel is a basic freedom under the Michigan Constitution" citing ***Pencak v Concealed Weapon Licensing Bd.***, 872 F. Supp 410, 414 (E.D. Mich. 1994). But even these cases clearly prove the right establish before the 1996 exile of Luther from Kent County.

4. REVIEW SHOULD BE GRANTED BECAUSE THE DISTRICT COURT VIOLATED PRECEDENT BY STAYING DISCOVERY AND JUMPING TO SUMMARY JUDGMENT.

In ***Crawford-El v Britton***, 523 US 574, 593 (1998), a pro se case, the Court said discovery should not be completely shut off and condemned such as placing "a thumb on the defendant's side of the scales" of JUSTICE.

> "n14 These various protections may not entirely foreclose discovery on the issue of motive, and the Court of Appeals adopted its heightened proof standard in large part to facilitate the resolution of summary judgment motions before any discovery at

> all. Discovery involving public officials is indeed one of the evils that Harlow aimed to address, but neither that opinion nor subsequent decisions create an immunity from all discovery. Harlow sought to protect officials from the costs of "broad-reaching" discovery, 457 U.S. at 818, and we have since recognized that limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity. ***Anderson v Creighton***, 483 US 635, 646, n 6, 97 L Ed 2d 523, 107 S Ct 3034 (1987); see also ***Mitchell v Forsyth***, 472 US 511, 526, 86 L Ed 2d 411, 105 S Ct 2806 (1985)." Id. at 593.

Petitioner here contends the district judge put his thumb on the scales of JUSTICE on Defendants side and that the 6th Cir. knew it, but refused to deal with it.

But this is the "new era" the judges have referred to.

> "As the Sixth Circuit has noted, the federal courts have entered a "new era" in summary judgment practice. ***Cox v Kentucky Dep't of Transp.***, 53 F.3d 146, 150 (6th Cir 1995); ***Street v J.C.Bradford & Co.*** 886 F2d 1472, 1478-81 (6th Cir 1989). While preserving the constitutional right of civil litigants to a trial on meritorious claims, the courts are now vigilant to weed out fanciful, malicious, and unsupported claims before trial."

(App p 6)

It is also an "era" this Count needs to look at, again, considering the magnitude of summary judgment cases it has reversed. If they are any indication of statistical importance, the number unreversed and unappealed is staggering in both state and federal courts.

Should this Court continue to allow lower courts to "quicken the desired pace by which more and more troublesome cases become quick and easy riddance" by means of summary judgment? ***Zimmerman v Stahlin***, 374 Mich 93, 101 (1964) J. Black dissenting.

> "Lawyers and laymen know from hard experience the injustice of delayed justice. They do not yet know, quite so well at least, the *injustice of justice mechanized into production schedules* by these new-fangled methods of *trying cases without trials.* The latter may do away - superficially - with the need for more judicial manpower and yet *harm the cause of true justice.*" ***City of Detroit v Eisele,*** 362 Mich Rep 690-691, (1961) (J. Black dissenting with CJ Dethmers & J Kavanagh) (emphasis added)

True justice has been harmed and obstructed. It will be harmed more if this case is not accepted and reversed.

5. PETITIONER BELIEVES THE RIGHTS ABRIDGED WERE CLEARLY ESTABLISHED AND, THEREFORE, THE DISMISSAL AT THE DISTRICT COURT VIOLATED PRECEDENT AND WAS WRONGLY GRANTED ON THE BASIS OF IMMUNITY.

There is no question that the district court dismissed on the basis of immunity. (App p 4-16) The only question that remains is whether the rights claimed were clearly established. Petitioner has provided authorities and contended that they are.

If the rights were clearly established, dismissal denied petitioner his constitutional rights to proceed with the suit and petitioner should have won reversal at the 6th Cir. and here.

> ***Harlow*** itself said as much: "*If the law was clearly established, the immunity defense ordinarily should fail,* since a reasonably competent public official should know the law governing his conduct." 457 US at 818-819; see also ***Butz,*** 438 U.S. at 506 ("It is not unfair to hold liable the official who knows or should know he is acting outside the law . . . ."). ***Crawford-El v Britton,*** 523 US 574, 591, 118 S Ct 1584, 140 L Ed 2d 759 (1998)

The rights claimed are the right to travel, (1st Am., 9th Am. 14th Am privilege and liberty) right to associate with children, family, business associates and friends, (1st Am.) and Double Jeopardy protection against double sentences (5th Am.) (See authorities or copy from appeal brief)

Common sense says that there is a right to travel intrastate. Everybody does it all the time.

Furthermore the right is established in law.

> "b – One may travel along the public highways or in public places; and while conducting himself or herself in a decent and orderly manner, disturbing no one, and interfering with the rights of no other citizen, there, they will be protected under the law, not only in their persons, but in their safe conduct." ***Pinkerton v Verberg***, 78 Mich 573, 44 NW 579 (1889)

The right of association with children and family. ***MLB v SLJ***, 519 US 102; 117 S Ct 555; 136 L Ed2d 473 (1996)

6. A DISTRICT COURT JUDGE HAS AN EXTREME AMOUNT OF POWER TO DETERMINE WHO PREVAILS IN ANY LITIGATION. UNCHECKED IT CAN DAMAGE THE CAUSE OF JUSTICE AND THE REPUTATION OF THE JUDICIAL BRANCH.

In ***Leatherman v Tarrant County Etc.***, 507 US ____, 122 L Ed 2d 517, 113 S Ct 1160 (1993) this Court said that among their many powers, district judges have power to "control . . discovery to weed out unmeritorious claims". 122 L Ed 2d at 524.

But has this Court considered that the same power can be abused?

If a biased judge would like a plaintiff to lose, one of the best ways to assure so is to cut off discovery or, as in this case, eliminate it altogether.

The Founders and Rebels who fought for independence did not have much, if any, faith in the King's judges. (See Declaration of Independence - "he obstructed

the administration of justice . . ." not by his own hand, but by his judges and policies.) Therefore, they repeatedly wrote into the Declaration of Independence and Constitution the right to a jury of their peers to decide the important issues in civil and criminal cases. (Const. III, sec 2, 6th Am., 7th Am.)

The judicial creation of summary judgment has eliminated the jury for all practical purposes for most litigants. (Petitioner has no statistics to prove it or access thereto, but based on knowledge and belief believes that 75% or greater of the cases filed never see a jury.) But, in contrast, the limitations on judges have been judicially relaxed. (For example - absolute immunity money damages, which in effect is absolute immunity from everything - criminal and civil.)

CONCLUSION

In conclusion, Mr. Luther respectfully requests that, in light of the national importance of the reasons presented and this Courts duty to uphold the Constitution and laws, this Court grant the Petition for Certiorari and decide the issues on the merits and in accord with the Constitution and laws of the United States of America in order that it may remain a free nation "under God with Liberty and Justice for all."

Date: August 27, 2002

William T. Luther
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No. 01-2232

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED APR 30, 2002
LEONARD GREEN, Clerk

WILLIAM THORNTON LUTHER,
Plaintiff-Appellant,

v ORDER

MICHAEL BURTON and the COUNTY OF KENT,
Defendants-Appellees

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION 6th Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the court. This notice is to be permanently displayed if this decision is reproduced.

Before: DAUGHTREY and MOORE, Circuit Judges; ECONOMUS, District Judge.*

William Luther, a Michigan resident proceeding pro se, appeals the district court order dismissing his civil rights action filed pursuant to 42 U.S.C. ° 1983. This case has been referred to a panel of the court pursuant to Rule 340)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Seeking monetary, declaratory, and injunctive relief, Luther sued Michael Burton and Kent County, Michigan, on his own behalf and on behalf of his minor children. A state court trial judge placed Luther on four years of probation after Luther pleaded no contest to attempted sexual assault,

Burton, a probation agent, recommended to the judge that Luther's movements in Kent County be restricted. Luther alleged that Burton and Kent County violated Luther's rights to: (1) travel in Kent County; (2) live where he wants; (3) freely associate; and (4) do business in Kent County. He also claimed that the defendants violated his children's rights to freedom of association. The defendants filed separate motions for summary judgment. Luther filed a response to Kent County's motion, but filed a "Motion for Clarification" instead of a response to Burton's motion. The district court granted summary judgment for the defendants, holding that the court lacked subject matter jurisdiction over a state court probation matter, that Kent County had no role in Luther's probation, and that Burton was entitled to qualified immunity.

In his timely appeal, Luther argues that: (1) he was denied discovery; (2) the district court judge was biased against him; (3) Burton's actions constituted "triple jeopardy;" and (4) Burton was not entitled to qualified immunity.

This court reviews an order granting summary judgment de novo. *Holloway v. Brush*, 220 F.3d 767, 772 (6th Cir. 2000). Summary judgment is proper" if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Upon review, we conclude that the district court properly granted summary judgment to the defendants. Luther presented no evidence that either Kent County or Burton were responsible for the conditions of his probation. Under the Michigan Constitution, the courts constitute a separate branch of government from the counties. Mich. Const. of 1963, art. VI, sec 1; art. VII, sec 1. Thus, Kent County could not be held responsible for ajudge's decision. Moreover, Burton swore that he was employed by the Michigan Department of Corrections and was not

personally involved in the judicial order that imposed probation on Luther. Luther did not counter that proof In sum, Luther failed to present evidence on which a jury could reasonably find for him and against Kent County and Burton. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Having concluded that the district court properly dismissed Luther's case because of the lack of proof, we need not address the court's other grounds for dismissal. We have considered Luther's arguments on appeal and conclude that they are without merit.

For the foregoing reasons, we affirrn the district court's order. Rule 340)(2)(C), Rules of the Sixth Circuit.

* The Honorable Peter C. Economus, United States District Judge for the Northern District of Ohio, sitting by designation.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

WILLLAM LUTHER,
Plaintiff

Honorable David W. McKeague

v

Case No. 1:00 cv 802

MIKE BURTON, et al.,
Defendants.

OPINION

This is a civil rights action brought by pro se pursuant to 42 U.S.C. sec 1983. Plaintiff is a convicted sex offender. He plead no contest to attempted sexual assault and was sentenced to a four year term of probation. In this lawsuit plaintiff attempts to challenge terms of a state judge's probation order restricting plaintiffs travel within Kent County: the county within which his ex-wife and children reside. Plaintiff filed his complaint on October 26, 2000. He named as defendants the County of Kent and Mike Burton, a retired state probation agent. Plaintiff's complaint seeks monetary, declaratory and injunctive relief against defendants in their individual and official capacities.

On February 23, 2001, defendant County of Kent filed a motion for summary judgment. (docket # 6). The court issued an order on February 27, 2001 advising plaintiff of his opportunity to submit affidavits, documents, or other materials in opposition to defendant's motion. (docket # 10). On March 28, 2001, plaintiff filed a document captioned as "Plaintiff's Opposition to Kent Counties [sic] Motion for Summary Judgment." (docket # 17). Defendant Burton filed a hybrid motion for summary judgment or to dismiss on April 30, 2001 (docket# 20). The court [1] issued an order on May 2, 2001, advising plaintiff of his opportunity to present affidavits and other materials in response to defendant

Burton's motion for summary judgment on or before May 30, 2001. (docket # 21). Plaintiff elected not to file any timely response to defendant Burton's motion. Instead, plaintiff served a first set of interrogatories upon defendant Burton. (docket # 23). Defendant Burton, having raised the defense of qualified immunity, filed a motion requesting a stay of discovery pending resolution of this defense to plaintiffs lawsuit. (docket # 24). Plaintiff delayed until July 9, 200 1, to file a "Motion for Clarification" with regard to defendant Burton's motion for summary judgment. (docket # 25). For the reasons set forth below, defendant's motions for summary judgment will be granted. Defendant Burton's motion for a stay of discovery will be dismissed as moot. Plaintiff's motion for clarification will be denied.

1.

Plaintiff's motion for clarification requires little discussion. Plaintiff argues that the court should grant his motion because: (1) defendant Burton's motion is "not clear to Mr. Luther," and (2) the defendants' motion for summary judgment or to dismiss are "confusingly commingled." Neither assertion has merit. Plaintiff's confusion is not a basis upon which to deny a defendant's meritorious motion. "[A] willfully unrepresented plaintiff assumes the risks and accepts the hazards which accompany self-representation." *Graham-Humphreys v. Memphis Brooks Museum of Art*, 209 F. 3 d 5 5 2, 5 61 (6th Cir. 2000); see also *May v. Pike Lake State Park*, No. 00-4203, 2001 WL 493407, at * 1 (6th Cir. May 1, 2001); *Siler v. Seabold*, No. 00-5789, 2000 WL 1800646, at * 1 (6th Cir. Dec. 1, 2000). [2]

There is nothing confusing about defendant Burton's motion for summary judgment. On May 2, 2001, the court issued an order converting defendant's hybrid motion into a simple motion for summary judgment, and requiring plaintiff to submit affidavits, documents or other materials in opposition to the motion within 28 days of the date of th[e] order." (docket # 21); see *Kostrzewa v. City of Troy*, 247 F.3d 633, 644 (6th Cir. 2001). Plaintiff elected not to file any timely response. Plaintiff's belated claims of confusion do

not provide any basis for delaying a decision upon defendants' motion for summary judgment. Plaintiff's motion for clarification will be denied.

2.

Defendants have filed motions for summary judgment. As the Sixth Circuit has noted, the federal courts have entered a "new era" in summary judgment practice. *Cox v. Kentucky Dep't of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995); *Street v. J. C. Bradford & Co.*, 886 F.2d 1472, 1478-81 (6th Cir. 1989). While preserving the constitutional right of civil litigants to a trial on meritorious claims, the courts are now vigilant to weed out fanciful, malicious, and unsupported claims before trial. Summary judgment is appropriate when the record reveals that there are no issues as to any material fact in dispute and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1009 (6th Cir. 1997) (en banc); *Sable v. General Motors Corp.*, 90 F.3d 171, 175 (6th Cir. 1996); *Payne v. Board of Education*, 88 F.3d 392, 397 (6th Cir. 1996) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). The standard for determining whether summary judgment is appropriate is "whether `the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" See *Adcox v. Teledyne, Inc.*, 21 F.3d 1381, 1385 (6th [3] Cir. 1994) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 251-52); see also, *Henderson v. Ardco, Inc.*, 247 F.3d 645, 649 (6th Cir. 2001); *Napier v. Madison County, Ky.*, 238 F.3d 739, 741 (6th Cir. 2001).

The court must consider all pleadings, depositions, affidavits, and admissions on file, and draw all justifiable inferences in favor of the party opposing the motion. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Napier*, 238 F.3d at 741. The party moving for summary judgment bears the initial burden of pointing out to the district court that there is an absence of evidence to

support the nonmoving party's case, but need not support its motion with afldavits or other materials "negating" the opponent's claim. *Moore v. Philip Morris Companies, Inc.*, 8 F.3d 335, 339 (6th Cir. 1993). Once defendants show that "there is an absence of evidence to support the nonmoving party's case," plaintiff has the burden of coming forward with evidence raising a triable issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To sustain this burden, plaintiff may not rest on the mere allegations of his pleadings. FED. R. CIV. P. 56(e); *Campbell v. Grand Trunk Western R.R.*, 238 F.3d 772, 775 (6th Cir. 2001); *Cox*, 53 F.3d at 150. A party opposing a motion for summary judgment has the burden to come forth with requisite proof to support his legal claim. See *Noble v. Chrysler Motors Corp.*, 32 F.3d 997, 999 (6th Cir. 1994); *Street v. J. C. Bradford & Co.*, 886 F.2d at 1478-81; *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1310 (6th Cir. 1989). In so doing, plaintiff must set forth *specific facts* showing that there is a genuine issue for trial. FED. R. CIV. P. 56(e); see *McKenzie v. Bellsouth Telecomm., Inc.*, 219 F.3d 508, 512 (6th Cir. 2000); *Mounts v. Grand Trunk Western R.R.*, 198 F.3d 578, 580 (6th Cir. 2000). Applying these standards, defendants' motions for summary judgment will be granted. [4]

Facts

Plaintiff is a convicted sex offender. He pleaded no contest to attempted sexual assault in Kent County Circuit Court. Plaintiff's ex-wife lives in Kent County, Michigan. Plaintiff's two children have resided with his ex-wife at all times after his criminal conviction. A state-court judge sentenced petitioner to a term of four years' probation on his attempted criminal sexual conduct conviction. Plaintiff has not alleged the identity of the trial court judge, the date of his guilty plea, the date of his sentence, and whether he has completely served his probationary period.

Plaintiff violated one or more of the initial conditions of his probation. He served some time in jail as a result. While plaintiff was in jail, his probation agent,

defendant Burton, recommended an amendment to the court's probation order. The proposed amendment stated that plaintiff "shall not enter the County of Kent, Michigan, except in passing through while driving on I-96, I-196 or US-131 in transit to another county, without written permission from the Probation Officer." The trial court judge, in his discretion, elected to amend his probation order to incorporate this restriction. Plaintiff now objects to the additional condition imposed upon his probation.

Discussion

Defendants are entitled to judgment in their favor as a matter of law on multiple grounds.

A. Subject-Matter Jurisdiction

Plaintiff seeks federal district court intervention to overturn portions of a state court probation order issued following plaintiff's criminal conviction. This court has no direct supervisory role over the state courts. If plaintiff was dissatisfied with a decision of a state court judge related [5] to his criminal conviction or sentence, his method of challenging such decision was an appeal through the state court system. This court simply lacks jurisdiction to review the state-court sentence plaintiff. attempts to challenge in this civil lawsuit. See *District of Columbia Circuit Court of Appeals v. Feldman*, 460 U.S. 462, 483 n. 16 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413,415-16 (1923); see also *Evans v. Klaeger*, No. 00-4353, 2001 WL 700825, at * 1 (6th Cir. June 12, 2001); *Carr v. Spencer*, No. 00-4488, 2001 WL 700834, at * 1 (6th Cir. June 12, 2001).

B. County of Kent

A county is liable only for acts done by its agents or employees in furtherance of county policy, custom or practice. See *Monell v. New York City Dep 't of Social Servs.*, 436 U.S. 658 (1978); *Holloway v. Ohio*, 179 F.3d 431,437 (6th Cir. 1999). Plaintiff named Kent County as a defendant under the assumption that defendant Burton was a county

employee. (Complaint #4). This assumption proved false. As a probation agent, defendant Burton was an employee of the Michigan Department of Corrections. MICH. COMP. LAWS sec 791.204, 791.206(1)(b). The county did not have any oversight over Burton, and cannot be held liable for any of his actions.

The county cannot be held liable for the actions of a judge of the 17th Circuit Court for the County of Kent, Michigan. A circuit court judge is not a county employee. He is a state employee. See *Fox v. Van Oosterum*, 176 F.3d 342, 353-54 (6th Cir. 1999). Under the Michigan Constitution, all courts in the state are part of "one court of justice," which constitutes a separate branch of state government. MICH. CONST. OF 1963, art. 6, ° 1; see *Opria v. City of Portage*, No. 4:91-cv-33, 1992 WL 71386 (W.D. Mich. Mar. 20, 1992). Suits against state courts and state-court judges in their official capacities are therefore barred by the Eleventh Amendment. *See Clark [6] v. Clark*, 984 F.2d 272, 273 (8th Cir. 1993); see also *Foster v. Walsh*, 864 F.2d 416, 418 (6th Cir. 1988). Plaintiff has not pled, nor supported with evidence, any theory upon which the County of Kent can be held liable. Accordingly, defendant's motion for sununary judgment will be granted.

C. Defendant Burton

Defendant Burton has asserted immunity defenses. Upon review, the court finds that plaintiff's claims against defendant Burton in his official capacity are barred by Eleventh Amendment immunity. Defendant Burton is entitled to qualified immunity (fn 1) on all plaintiff's claims for damages against him in his individual capacity.

The Eleventh Amendment provides that:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State.

U.S. CONST. amend. XI. Although the amendment by its terms prohibits only suits against a state by citizens of another state or by aliens, the Supreme Court has held that the amendment's fundamental principles of sovereign immunity negate federal exercise of jurisdiction over suits by citizens against their own states as well. *Board of Trustees of Univ. of Ala, v. Garrett*, 121 S. Ct. 955, 962 (2001); *Hans v. Louisiana*, 134 U.S. 1 (1890); see *Pennburst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984); *Mumford v. Basinski*, 105 F.3d 264, 267 n.3 (6th Cir. 1997). The Eleventh. Amendment bars any suit, absent consent, against the state regardless of the form of relief requested. *Pennburst*, 465 U.S. at 100-01. It is well settled that the Eleventh Amendment bars federal court actions against the agencies and departments of the state, as well as the state itself. *Pennhurst*, 465 U.S. at 100; *Alabama v. Pugh*, 438 U.S. 781,782 (1978) (per curiare). Additionally, claims in federal court against state employees brought against them in their official capacities must be dismissed on Eleventh Amendment immunity grounds, as a suit against a state officer in his or her official capacity is tantamount to a suit against the state itself. See *Brandon v. Holt*, 469 U.S. 464, 471 (1985). Defendant Burton is entitled to Eleventh Amendment immunity upon.plaintiffs claims against him in his official capacity.

Defendant Burton is entitled to qualified immunity upon plaintiff's claims for monetary damages against him in his individual capacity. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. The standard to be applied in deciding a claim of qualified immunity is one of objective reasonableness. *Id.* The question whether qualified immunity attaches to an official's actions is a purely legal issue for the trial court. See

Summar v. Bennett, 157 F.3d 1054, 1057 (6th Cir. 1998); *Dominque v. Telb*, 831 F.2d 673,677 (6th Cir. 1987).

The Supreme Court emphasized in its recent decision in *Saucier v. Katz*, 121 S. Ct. 2151, 2155-56 (2001), that the defense of qualified immunity must be considered in proper sequence. [8]

> "In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence. Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. Qualified immunity is an entitlement not to stand trial or face other burdens of litigation. The privilege is an immunity from suit rather than a mere defense to liability; and like an absolute liability, it is effectively lost if a case is erroneously permitted to go to trial. As a result, we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation."

121 S Ct at 2155-56 (citations omitted). The initial inquiry must be whether the plaintiff has alleged and supported with evidence facts showing that the defendants' conduct violated a constitutional right. 121 S. Ct. at 2156. Plaintiff asserts a violation of his right to travel within Kent County, Michigan. Plaintiff also claims that the judge's probation order imposing travel restrictions infringed upon his First Amendment right to associate with his children, family and friends living within Kent County.

In *Saenz v. Roe*, 526 U.S. 489 (1999), the Supreme Court stated, "The word 'travel' is not found in the text of the Constitution. Yet, the 'constitutional right to travel from one state to another is firmly imbedded in our jurisprudence.'" 526 U.S. at 498 (quoting *United States v. Guest*, 383 U.S. 745 (1966)). The Court went on to state that the right to interstate travel has at least three components:

(1) the right of a citizen of one State to enter and to leave another state; (2) the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state; and (3) for those travelers who elect to become permanent residents, the right to be treated like other citizens of that state. The Supreme Court's *Saenz* opinion then went on to examine the textual underpinnings for each of these rights. In this case, that step is unnecessary as nothing in plaintiff's complaint implicates a constitutional right to interstate travel. Plaintiff's complaint concerns only intrastate travel. The Supreme Court has never recognized such a right. The federal [9] appellate courts are split on the issue of whether a constitutional right of intrastate travel exists. See *Hutchins v. District of Columbia*, 188 F.3d 531,537-38 (D.C. Cir. 1999)(collecting cases).

The Supreme Court has recognized a constitutional right of association. See *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)("implicit in the activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends"); *Boy Scouts of Arnerica v. Dale*, 530 U.S. 640 (2000) (First Amendment right of "expressive association").

In broad fashion, plaintiff has identified possible constitutional rights that might suffer some degree of limitation as a result of plaintiff's criminal conviction. However, it is well established that a criminal conviction may result in the loss or restriction of rights. "A criminal conviction often carries with it numerous civil and social disabilities. For example, a conviction may result in the loss of the rights to vote, to hold a public office, to serve on a jury, and to practice various occupations and professions." *Tuten v. United States*, 460 U.S. 660, 664 (1983). A conviction may make the offender subject to increased penalties for subsequent convictions. 460 U.S. at 664-65. It is patent that there is nothing unconstitutional about placing a convicted criminal defendant on parole or probation. See *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrisey v. Brewer*, 408 U.S. 471

(1972). The judge accepting plaintiff's guilty plea might well have selected incarceration rather than the more lenient sentence of probation. If the sentencing judge had selected incarceration, he would no doubt have imposed greater restfictions upon plaintiff's ability to travel and associate with others than the [10] probation provision limiting plaintiff's travel to specific highways within the county absent the prior written permission of his probation officer. (fn 2)

Defendant Burton is entitled to summary judgment because there was and is no clearly established law alerting a probation officer in defendant's position that recommending this travel restriction to a sentencing judge would be unlawful. *Saucier*, 121 S. Ct. at 21563 see *Key v. Grayson*, À 179 F.3d 996 (6th Cir. 1999); *Summar v. Bennett*, 157 F.3d 1054, 1058 (6th Cir. 1998). "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." 121 S. Ct. at 2156-57. "Qualified immunity protects'all but the plainly incompetent or those who knowingly violate the law.'" 121 S. Ct. at 2157 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

The court must focus on whether, at the time defendant acted, the right asserted was "clearly established" by the decisions of the Supreme Court or the Sixth Circuit. See *Walton v. City of Southfield*, 995 F.2d 1331, 1335-36 (6th Cir. 1993); Garvie v. Jackson, 845 F.2d 647, 649 (6th Cir. 1988). In rare instances, it is possible for decisions of other courts to clearly establish the law. *Key*, 179 F.3d at 1000. "If reasonable officials could disagree on the issue, immunity should be recognized." *Id.* "For qualified immunity to be surrendered, pre-existing law must dictate, that is truly compel (not just suggest or allow to raise a question about), the conclusion for every-like situated, reasonable government agent that what the defendant is doing violates federal law in the circumstances." *Saylor v. Board of Educ.*, 118 F.3d 507, 514 (6th Cir. 1997). "The burden of convincing a court that the law was clearly established 'rests squarely

with the plaintiff.'" *Key* 179 [11] F.3d at 1000 (quoting *Cope v. Heltsley*, 128 F.3d 452, 459 (6th Cir. 1977)). Defendant Burton's conduct in recommending a travel restriction within Kent County did not violate any clearly established law.

In summary, defendant Burton is entitled to summary judgment in his favor on plaintiff's claim for monetary damages against him in his individual capacity on the basis of qualified immunity. Qualified immunity is immunity from suit and attendant discovery burdens. 121 S. Ct at 2156. Defendant Burton's motion for a stay of discovery will be dismissed as moot in light of the court's finding that he is entitled to qualified immunity.

Plaintiff's requests for declaratory and injunctive relief against defendant Burton in his individual capacity will be denied. Plaintiff's request for injunctive relief is moot. Defendant Burton is retired, and he is therefore incapable of infringing plaintiff's rights in the future. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983); *Grenclell v. Ohio Supreme Court*, 252 F.3d 828, 833 (6th Cir. 2001); *Smith v. Securities & Exch. Comm'n*, 129 F.3d 356, 363 (6th Cir. 1997) (en banc). Furthermore, Mr. Burton never possessed authority to alter or amend a state-court judge's probation order. As plaintiff has no viable constitutional claim against Burton, it is patent that there is no legal basis for an order granting plaintiff's request for declaratory relief. [12]

Conclusion

For the reasons set forth herein, defendants' motions for summary judgment (docket #'s 6, 20), will be granted, defendant Burton's motion for a stay of discovery (docket # 24) will be dismissed, and plaintiff's "motion for clarification" (docket # 25) will be denied.

Dated: July 30, 2001

/s/ David W. McKeague
David W. McKeague
United States District Judge

fn 1 If Burton had asserted an absolute immunity defense, he would almost certainly be entitled to absolute quasi-judicial immunity for his role in making a probation recommendation to a state circuit court judge. See *Holloway v. Brush*, 220 F.3d 767 (6t'h Cir. 2000)(en banc); *Ireland v. Tunis*, 113 F.3d 1435 (6th Cir. 1997); accord *Demoran v. Witt*, 781 F.2d 155, 156 (9th Cir. 1986) (probation officers preparing presentence reports entitled to absolute immunity). However, the Supreme Court has clearly placed the burden of establishing the justification for absolute immunity on a party asserting it. The presumption is that qualified immunity rather than absolute immunity is sufficient to protect a government official in the exercise of his duties. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 432 (1993); *Burns v. Reed*, 500 U.S. 478, 486-87 (1991). The court need not reach the absolute immunity issue because defendant Burton is clearly entitled to at least qualified immunity.

fn 2 The lenient nature of plaintiff's sentence is in all likelihood the reason he elected not to appeal his sentence through the available state-court procedures. [13]

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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filed July 31, (unreadable)

WILLIAM LUTHER, Plaintiff,
v.
MICHAEL BURTON, et al., Defendant.

Case No. 1:00 cv 802
Honorable David W. McKeague

JUDGMENT

In accordance with the opinion filed this date:

IT IS ORDERED that defendants' motions for summary judgment (docket #'s 6, 20) are GRANTED, and judgment is hereby entered in favor of defendants. Defendants may tax their costs.

IT IS FURTHER ORDERED that defendant Burton's motion for a stay of discovery on the basis of his qualified immunity (docket # 24) is DISMISSED as moot.

IT IS FURTHER ORDERED that plaintiff's motion for clarification (docket # 25) is DENIED.

Dated: July 30, 2001 /s/ David W. McKeague
David W. McKeague
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

filed 00 Oct. 26, 11:01 am

and his minor children
William Luther
Plaintiffs

v

Civil action #1:00CV 802
David W. McKeague
District Judge

Mike Burton,
Kent County,
Defendants

JURY DEMAND

William Luther
897 Barnum
Wyoming, Michigan 49509

COMPLAINT

1. Mr. Luther was arrested and charged with a sexual offense. He plead nolo contendre to attempted sexual assault and was sentenced to probation for 4 years. This suit concerns violation of his civil rights under 42 USC sec 1983.

JURISDICTION

2. The District Court has jurisdiction under 28 USC sections 1343 and 1331.

PARTIES

3. Plaintiffs William Luther and his two minor children are and were residents of Kent County, Michigan, United States of America.

4. Defendant Kent County is a subdivision of the State of Michigan. Other defendants Plaintiff believes are agents of Kent County, Michigan All are sued in the individual and official capacities.

5. Defendants operating under color of law, are being sued in their individual and official capacities under 42 USC sec 1983 for the following violations of Mr. Luther's constitutional rights.

FACTS

6. The Defendants deliberately and unconstitutionally imposed a probation limit on the substantial rights of Mr. Luther to (1) travel in and (2) live in Kent County, Michigan for a period of 14 months. They literally barred Mr. Luther from Kent County for over 14 months.

7. For many months Mr. Luther attempted to comply with this unconstitutional violation of his rights. But at one point he violated this unjust requirement. When Mr. Luther wanted to travel in Kent County to visit his children he was wrongly denied the right.

COUNT 1

8. The Defendants violated Mr. Luther's right to travel in Kent County by prohibiting him from traveling in Kent County except to travel through the county.

COUNT 2

9. Defendants violated Mr.Luther's freedom and liberty right to live where he wants by prohibiting Mr. Luther from living in Kent County.

COUNT 3

10. Defendants as a result of their above described actions violated Mr. Luther's First Amendment right to associate freely with his (A) children and (B) family and (C) friends by prohibiting him from living in Kent County and traveling in Kent County.

COUNT 4

11. Defendants by their above described actions violated Mr. Luther's freedom to and right to do business in Kent County by prohibiting him from living in and traveling in Kent County in violation of the 9th Amendment.

COUNT 5

12. Defendants by their above described actions violated the rights of Mr. Luther's minor children to freely associate with their father for a period 14 months when he was wrongly denied the right of entering Kent County.

13. As a result of the foregoing acts committed against the Plaintiffs by Defendants, Plaintiffs sustained injury to their freedoms, reputations, and suffered humiliation, embarrassment, emotional distress and anguish, all of which continue to the present time.

14. Wherefore, Plaintiffs demand judgment against Defendants as follows:

RELIEF

15. Plaintiffs seek financial relief, injunctive relief and declaratory relief.

16. That because of the acts and/or malicious of Defendants, whether willful or otherwise, in gross disregard of the civil rights and well-being of the Plaintiffs, Plaintiffs are entitled to the additional sum of _____ as punitive and/or exemplary damages.

17. Plaintiffs request all other such relief as JUSTICE and prior cases have found appropriate

18. Plaintiffs seek attorney fees and costs under 42 USC sec 1988.

October 25, 2000

/s/ William Luther
William Luther for himself
and his minor children

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
Area Code 202
CLERK OF THE COURT
479-3011

July 26, 2002

Mr. William T. Luther
119 N. Centennial
Zeeland, MI 49464

Re: William Thornton Luther v. Michael Burton, et al.
Application No. 02A83

Dear Mr Luther:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on July 26, 2002, extended the time to and including August 28, 2002.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk
by /s/GBJ
Gail B. Johnson
Assistant Clerk